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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TODD MICHAEL FICETO,

Defendant.

No. CR 13-183-VAP

GOVERNMENT'S RESPONSE TO DEFENDANT  
TODD MICHAEL FICETO'S SENTENCING  
MEMORANDUM

Hearing Date: March 23, 2020  
Hearing Time: 9:00 a.m.  
Location: Courtroom of the  
Hon. Virginia A.  
Phillips

Plaintiff United States of America, by and through its counsel  
of record, the United States Attorney for the Central District of  
California and Assistant United States Attorneys Cassie D. Palmer,  
Scott Paetty, and Ian V. Yanniello, hereby files its Response to  
Defendant Todd Michael Ficeto's Sentencing Memorandum.

1        This response is based upon the attached memorandum of points  
2 and authorities and exhibits, the files and records in this case, and  
3 such further evidence and argument as the Court may permit.

4 Dated: February 10, 2020

Respectfully submitted,

5                    NICOLA T. HANNA  
6                    United States Attorney

7                    BRANDON D. FOX  
8                    Assistant United States Attorney  
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10                    /s/  
11                    \_\_\_\_\_  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Todd Michael Ficeto ("defendant") filed a sentencing  
4 recommendation requesting a probationary sentence. Such a sentence  
5 not only strains credulity but also is impermissible.<sup>1</sup> The evidence  
6 presented at trial established that defendant played a vital and  
7 necessary role in carrying out a sophisticated, multi-national stock  
8 manipulation scheme through which he and his co-conspirators Florian  
9 Homm ("Homm") and Colin Heatherington stole more than \$200 million  
10 dollars from the Absolute Funds. The jury agreed and convicted  
11 defendant of 18 felonies (including eight Class B felonies). These  
12 convictions related not only to defendant's integral role in the  
13 execution of the fraud, but also to the series of lies defendant told  
14 and the obstructive conduct he systematically undertook in his futile  
15 attempts to cover up his crimes. Defendant sought to shield himself  
16 from culpability by hiding behind and putting in harm's way those who  
17 trusted him—first, his employees, who lost their licenses and  
18 livelihoods, and then his father, who defendant installed as the sham  
19 executor of a foreign trust defendant created to hide the ten million  
20 dollars he transferred off-shore mere days before his testimony  
21 before the Securities and Exchange Commission (an account defendant  
22 then lied about under oath). Even if a probationary sentence were  
23 permissible (which it is not), to adopt defendant's recommended

24 \_\_\_\_\_  
25 <sup>1</sup> See 18 U.S.C. § 3559(a)(2) ("An offense that . . . [where] the  
26 maximum term of imprisonment authorized is . . . twenty-five years or  
27 more [is] a Class B felony"); 18 U.S.C. § 3561 ("A defendant who has  
28 been found guilty of an offense may be sentenced to a term of  
probation unless . . . the offense is a Class A or Class B felony");  
U.S.S.G. § 5B1.1(b)(1) (a sentence of probation "may not be imposed"  
if "the offense of conviction is a Class A or B felony").

1 sentence, the Court would need to apply a 31-level variance to  
 2 defendant's total offense level of 43<sup>2</sup> (PSR ¶ 62), in order to move  
 3 defendant into Zone B, the threshold for probation. See U.S.S.G.  
 4 § 5B1.1(a)(2). Such a drastic deviation from the Sentencing  
 5 Guidelines is not supported by the facts and does not comport with  
 6 the goals of 18 U.S.C. § 3553(a). In the interests of justice, the  
 7 government has recommended a significant downward variance in this  
 8 case (15 levels), which is just and adequately accounts for the  
 9 arguments that defendant raises in his sentencing memorandum.

## 10 **II. THE PARTIES' AGREEMENT REGARDING SENTENCING**

11 As noted in its sentencing position, the government reiterates  
 12 that it recommends a sentence 96 months' imprisonment. The  
 13 government entered into the agreement in exchange for defendant's  
 14 waiver of his right to file post-trial motions and to appeal his  
 15 convictions and sentence, so long as the sentence the Court imposes  
 16 does not exceed the statutory maximum term of imprisonment. (CR 281  
 17 ¶¶ 3-5, 8.)

## 18 **III. 3553(a) Factors**

### 19 **A. Nature and Circumstances of the Offense; History and** 20 **Characteristics of the Defendant**

21 **Defendant's Role in the Scheme:** In his sentencing memorandum,  
 22 defendant seeks to minimize the role he played in the scheme by  
 23 noting that he did not have contact with investors in the Absolute  
 24 Funds and did not control Homm's activities at the Funds. (Def. Mem.  
 25 at 4-5.) In so doing, defendant ignores his vital role and criminal  
 26

---

27  
 28 <sup>2</sup> Aside from vaguely challenging the loss amount calculations in  
 the PSR, defendant does not specifically challenge the base offense  
 level or enhancements adopted in the PSR.

1 partnership with Homm and Colin Heatherington. Defendant and Homm  
2 enjoyed a long business relationship together and jointly owned HWM.  
3 Defendant managed HWM and controlled its day-to-day operations,  
4 including approving all of the manipulative trades at the heart of  
5 the securities fraud scheme. Defendant also managed HWM's  
6 investment-banking arm through which he personally located the penny  
7 stock companies and arranged financing deals to take the companies  
8 public, generally through a reverse-merger process involving shell  
9 companies that defendant owned. It was the defendant who arranged  
10 financing deals whereby the Absolute Funds (via Homm) would invest  
11 millions of dollars in the penny stock companies in order to acquire  
12 a majority of the new company's stock. Through these deals,  
13 defendant and Homm paid themselves substantial placement agent fees  
14 out of the Absolute Funds' coffers and also issued themselves – and  
15 their co-conspirators – millions of shares in the penny stock  
16 companies, of which the co-conspirators controlled a significant  
17 portion of the freely tradable shares. Through their coordinated  
18 efforts, the criminal conspiracy then artificially inflated the  
19 prices of those penny stocks in order to pump up the net asset value  
20 of the Absolute Funds and create the false impression to investors  
21 that Homm's investment strategies were highly profitable, which  
22 enabled Homm to lure unwitting investors. These investors never  
23 would have invested in the Absolute Funds had they been aware that  
24 their investments would be placed in penny stocks or if they knew the  
25 Absolute Fund's reported profits were based on defendant and HWM's  
26 continuous stock manipulation. (Trial Tr., 28, June 14, 2019 (PM),  
27 attached hereto as Ex. 1; FBI interview of Lawrence Wang, July 24,  
28 2014302 at 2, attached hereto as Ex. 2.)

1 Defendant also was the founder and investment adviser of the  
2 Hunter Fund, an investment fund, whose sole investors were three of  
3 the Absolute Funds—Return Europe, Catalyst, and Octane. Defendant  
4 used the Hunter Fund to enrich himself and to mask investments by the  
5 Absolute Funds in the penny stock companies. As the registered  
6 investment adviser to the Hunter Fund, defendant owed the Fund a  
7 fiduciary duty, which he repeatedly violated by placing his own self-  
8 interest in enriching himself above the interests of the Fund.

9 **Defendant's Lies, Obstruction, and Sworn False Statements:**

10 Defendant's request for probation ignores aggravating facts relating  
11 to his attempts to evade detection and cover up his crimes through  
12 lying and instructing others to lie. To achieve the goal of  
13 manipulating penny stock prices, defendant specifically directed his  
14 head trader, Ahn, to use a secret, unarchived Microsoft Windows IM  
15 system, which was impermissible under FINRA and SEC rules, precisely  
16 because those messages were not automatically archived (and  
17 accordingly would not be subject to regulatory oversight). Defendant  
18 further instructed Ahn regarding how to answer questions posed by  
19 regulators, advising Ahn that "I don't recall," is a good answer.  
20 Then, in response to investigators' requests for information about  
21 HWM and defendant's role in it, defendant falsely claimed that he was  
22 not involved in trading and also falsely stated that HWM received  
23 trading instructions from the Absolute Funds only via telephone  
24 calls, email, and archived IMs via the Bloomberg system. Defendant's  
25 claim that he was not involved in trading was contradicted by all of  
26 the HWM witnesses. As Anita Razo, Elizabeth Pagliarini, and Tony Ahn  
27 testified, defendant was acutely aware of everything that went on at  
28 HWM—and even listened in on employees' telephone calls. (Trial Tr.,

1 98-100, June 12, 2019 (AM), attached hereto as Ex. 3; Trial Tr., 88,  
2 June 12, 2019 (PM), attached hereto as Ex. 4; Trial Tr., 94, June 26,  
3 2019 (PM); attached hereto as Ex. 5; Trial Tr., 18, June 18, 2019  
4 (AM), attached hereto as Ex. 6.) And, contrary to defendant's claims  
5 that Tony Ahn was responsible for all trading, defendant's name  
6 appears consistently throughout the secret IMs as the person who had  
7 to approve of all trades. (See Ex. 6 at 18-19.) In numerous secret  
8 IMs discussing penny stock trades, Colin Heatherington asked Tony Ahn  
9 for a report on defendant's whereabouts and expressed a desire to  
10 talk to defendant about the trades. Defendant even personally traded  
11 at the end of the month when Ahn was out for his child's birth. The  
12 need for defendant to know about and approve HWM's stock trades on  
13 behalf of the Absolute Funds, which comprised the vast majority of  
14 HWM's business, was clear, and undermines defendant's protestations  
15 to the contrary.

16 After Homm's departure from the Absolute Funds, defendant  
17 attempted to conceal the proceeds of the fraud through June 2008 by  
18 laundering the conspirators' ill-gotten gains through a series of  
19 wire transfers to himself, Homm, and Colin Heatherington, including  
20 by transferring nearly \$10 million into a foreign bank account  
21 defendant owned days before his SEC testimony. Defendant then lied  
22 to the SEC in writing under penalty of perjury and when testifying  
23 under oath about this bank account: (1) defendant falsely stated that  
24 he did not have any foreign bank accounts in his responses to the  
25 SEC's background questionnaire; and (2) confirmed that false answer  
26 on two occasions when questioned under oath about foreign bank  
27 accounts. Notably, to conceal his foreign assets and distance  
28

1 himself from his criminal profits, defendant installed his father as  
2 the trustee of this account.

3 Importantly here, defendant doubled down on several of these  
4 lies from the witness stand at trial. While the government did not  
5 seek a two-level upward adjustment for obstruction of justice under  
6 U.S.S.G. § 3C1.1, defendant's choice to testify untruthfully at trial  
7 is an aggravating factor that supports the government's recommended  
8 sentence of sentence of 96 months' imprisonment and militates against  
9 defendant's requested probationary term.

10 **Defendant Richly Profited from the Scheme:** Defendant personally  
11 profited by receiving millions of dollars in placement fees for the  
12 penny stock financing deals and making millions more in fees and  
13 commissions from HWM by executing the manipulative stock trades.  
14 Defendant lined his pockets with millions more by engaging in self-  
15 dealing trades (often in lock-step with his co-conspirators, which  
16 evinces their close coordination in the scheme) in which defendant  
17 and his conspirators sold their shares in the penny stock companies  
18 to the Absolute Funds. Defendant used these funds to buy lavish  
19 homes, luxury cars, and even a yacht with his co-conspirators, which  
20 they named "No Remorse." By his own admission, defendant personally  
21 garnered over \$27 million through HWM during the fraud scheme. (See  
22 Trial Ex. 772 at 23, Ex. 1 to Gov't Sent. Mem.)

23 Notably, the government credits certain mitigation referenced in  
24 defendant's sentencing memorandum, including defendant's efforts to  
25 improve his life after the offense conduct by, among other things,  
26 obtaining bachelor's and master's degrees and focusing on caring for  
27 his family. The government agrees that this conduct is mitigating  
28 and has accounted for these mitigating facts in its recommendation

1 that defendant be sentenced to 96 months' imprisonment. Defendant's  
2 position seeking a probationary sentencing, however, fails to address  
3 the factors justifying a 96-month sentence. For example, unlike many  
4 defendants who come before this Court to be sentenced, defendant has  
5 not had to overcome a great deal of adversity in his life. At the  
6 time of the offense, defendant enjoyed a loving, supportive family  
7 and a productive livelihood and stable employment. Thus, unlike many  
8 defendants, he did not commit his crimes out of economic desperation,  
9 or because of unaddressed mental health issues or to support a drug  
10 addiction. Defendant's crimes were driven by greed and opportunism.  
11 Based upon the totality of the circumstances, a 96-month sentence is  
12 just and appropriate.

13 **Defendant Was Fully Aware of the Scheme:** Contrary to  
14 defendant's assertions that he was unaware of "yellow" or "red" flags  
15 with respect to trades in the penny stock companies (Def. Mem. at 2,  
16 4 n.2), evidence at trial left no doubt that defendant displayed a  
17 disregard for the proper functioning of a free and open market and a  
18 willingness to keep the pipeline of penny stocks flowing to HMM and  
19 the Absolute Funds despite warnings that such practices were  
20 dangerous. Defendant's actions and coordinated efforts alone,  
21 including approving and executing his self-dealing trades in lock-  
22 step with his co-conspirators, show that he knew exactly what he was  
23 doing. His attempts to hide the scheme from regulators and his  
24 repeated lies only strengthen this conclusion. Further, HMM  
25 employees testified that defendant watched everything that happened  
26 at HMM closely and that nothing was approved without his endorsement.

27 Notably, there also was evidence presented at trial showing  
28 defendant's specific knowledge that his actions were harmful to the

1 Funds. Darius Parsi, a co-manager of the Absolute Return Europe  
2 Fund, testified that he warned defendant years before the scheme  
3 unraveled to stop bringing penny stocks to Homm, and defendant  
4 replied that Parsi should mind his own business. (Trial Tr., 67-68,  
5 June 25, 2019; attached hereto as Ex. 7.) This demonstrates what all  
6 of the evidence above makes clear: defendant was specifically aware  
7 of all aspects of the scheme that he helped perpetuate, including the  
8 negative effects of the penny stocks on the Funds and, in fact, had  
9 no remorse for the staggering amounts that the conspiracy generated  
10 at the expense of the Absolute Funds. When Parsi asked if defendant  
11 was concerned that what defendant and Homm were doing likely was  
12 securities fraud, defendant acknowledged that it probably was but  
13 quipped that the SEC was too overworked and understaffed to catch  
14 them. (Ex. 7 at 68-69.) On balance, defendant's role in the scheme  
15 and his history and characteristics warrant a 96-month sentence, not  
16 probation.

17 **B. Defendant Was Not Acting in "Good Faith"**

18 Defendant's references to his "good faith" are misleading.  
19 (Def. Mem. 5, 9.) As demonstrated at trial, defendant's actions were  
20 the opposite of good faith.

21 1. Defendant's Lengthy History in Trading and Regulatory  
22 Sanctions

23 At the time of the fraud, defendant had nearly twenty years of  
24 experience in the securities industry. (Trial Ex. 608 at 9-10,  
25 attached hereto as Ex. 8.) He also had a lengthy history of  
26 regulatory violations, which undercuts his claim that he was unaware  
27 of suspicious trading in penny stocks and inadvertently "ignored  
28 certain yellow or red flags." (Def. Mem. at 4 n.2.)

1 A closer look at defendant's violations is warranted. Defendant  
2 consented to a judgment and \$9,541 fine against him in February 1996  
3 for "Violation of the Penny Stock Rule," which barred him from  
4 recommending any transactions in penny stocks for two years, for  
5 "effect[ing] 18 transactions in a penny stock," amounting to  
6 approximately \$36,500, while failing to make the following  
7 disclosures to customers: (1) the risks of penny stock investments;  
8 (2) the inside bid and offer quotes and number of shares to which  
9 these quotes applied; (3) the total amount of compensation he  
10 received in connection with penny stock transactions; and (4) failing  
11 to deliver to each customer a "suitability statement" according to  
12 SEC rules. (Ex. 8 at 19-22.)

13 Furthermore, in June 2002, defendant consented to a fine and  
14 judgment against him for failing to report customer complaints to the  
15 NASD and executing equity securities transactions through his firm,  
16 VMR Capital Markets, without being registered as an equity trader.  
17 (Ex. 8 at 22-23.) Then, in December 2004, defendant was sanctioned  
18 and fined again at VMR Capital Markets for failing to comply with  
19 NASD rules and failing to supervise an employee who excessively  
20 traded in securities. (Ex. 8 at 25-26.) Indeed, because defendant  
21 failed to comply with the rules, FINRA required that defendant be  
22 supervised under a "heightened supervision plan," which required,  
23 among other things, that defendant hire a compliance officer. Rather  
24 than use the supervision plan to ensure his compliance with the law,  
25 however, defendant found a way to manipulate it and his compliance  
26 officer to conceal the fraudulent scheme for years.

27 Defendant's regulatory sanctions provide context for defendant's  
28 criminal conduct here, in which he escalated his troubling

1 involvement with penny stocks. HWM's head trader (Ahn) and  
2 compliance officer (Pagliarini) testified that they relied on  
3 defendant's experience and expertise. When they had questions about  
4 a trade—they went to defendant. Thus, contrary to the story  
5 defendant told at trial (and repeats here) of someone who was removed  
6 from trading operations at HWM and relied on the expertise of Homm  
7 regarding penny stock investments and the alleged oversight of his  
8 compliance officer (from whom he concealed key information including  
9 the secret IM system), defendant had experience with penny stock  
10 trading, was specifically aware of the risks involved in such  
11 trading, had been sanctioned previously for a failure to follow those  
12 rules, and intentionally disregarded those rules again and again to  
13 benefit himself and ultimately cause significant harm to the Absolute  
14 Funds and their investors.

15           2.   Assistance to Absolute Funds

16           Defendant's points to his assistance to the Absolute Funds in  
17 the wake of Homm's departure as evidence of his purported good faith  
18 (Def. Mem. at 6), but these actions are tainted by his self-interest.  
19 At trial, Glenn Kennedy (General Counsel of the Absolute Funds)  
20 testified that he viewed defendant's cooperation during this period  
21 as a self-interested attempt for defendant to determine to what  
22 extent his bad conduct was being uncovered and whether he was being  
23 blamed for the losses that resulted from the Absolute Funds' penny  
24 stock investments. (Trial Tr., 30-33, July 2, 2019, attached hereto  
25 as Ex. 9.) While defendant's actions may have been at least somewhat  
26 helpful to the Funds, they also benefited defendant. In its  
27 sentencing position, the government recognized defendant's behavior  
28

1 as somewhat mitigating and accounted for that fact, among others, in  
2 recommending a significant downward variance.

3           3.   Defendant's Lies and Attempts to Hide Behind Others

4           Defendant's lies detailed above in Section III(A) eviscerate his  
5 claims of good faith. Defendant claims that he "testified in good  
6 faith to the best of his ability." (Def. Mem. at 9.) But this  
7 statement is belied by the facts as established by the evidence and  
8 testimony at trial. Defendant lied at every step of the proceedings:  
9 during routine audits of HWM, during the FINRA and SEC investigations  
10 into the trading at HWM, under penalty of perjury in response to  
11 questions posed by the SEC in writing, under oath in testimony before  
12 the SEC, and under oath on the stand at trial. Defendant repeatedly  
13 has sought to minimize his role and to place the blame on others.  
14 However, defendant's testimony about this role at HWM stood in stark  
15 contrast to every other HWM witness at trial, which profoundly  
16 undermines his credibility. Moreover, defense counsel argued at  
17 length at trial that defendant acted in "good faith" and relied on  
18 the professionals he hired. The jury considered and rejected these  
19 arguments when it found defendant guilty of 18 felony counts.

20           More importantly, defendant's lies during the scheme and during  
21 trial demonstrate that the government's recommended sentence of 96  
22 months is needed for specific deterrence. As discussed above,  
23 defendant lied on the stand in an attempt to impeach the credibility  
24 of government witnesses. Rather than accept responsibility for his  
25 crimes or testify truthfully in his own defense, defendant chose to  
26 violate his oath and demonstrate his continuing contempt for the law.  
27 Such conduct warrants the sentence recommended by the government.  
28

**C. The Government's Recommended Sentence Would Not Result in Unwarranted Sentencing Disparities But Defendant's Recommended Probationary Sentence Would**

Section 3553(a)(6) requires the Court to minimize sentencing disparities among similarly-situated defendants. The government already accounted for the need to avoid unwarranted sentencing disparities in recommending a significant downward variance resulting in 96 months' imprisonment. The government has outlined in detail defendant's role, both in its sentencing position and in Section III(A). The government addresses specific arguments defendant raised in his sentencing memorandum as follows:

**1. Florian Homm**

Homm is a fugitive from justice. The government has vigorously sought his arrest and will vigorously pursue his prosecution if he is ever captured and within the United States' jurisdiction. Certainly the failures of a foreign nation (Italy) to secure defendant and the lack of a treaty enabling Homm's extradition (from Germany) should not be held against the government. The fact that Homm so far has succeeded in evading justice is not a mitigating fact in defendant's favor. Moreover, it should be noted that defendant assisted in laundering money to Homm, which facilitated Homm in his evasion of justice, at least incrementally. The Swiss document defendant cites is irrelevant and merely referred the case to the Swiss prosecutor for further investigation. (Reichert Decl. ¶ 15.)

**2. Colin Heatherington**

The government agrees with defendant that Colin Heatherington is a "central player" in the conspiracy. (Def. Mem. at 15.) Colin Heatherington currently is awaiting extradition, and preliminarily has been ordered extradited. As with Homm, the government has

1 consistently sought to bring Colin Heatherington to justice and will  
2 do so to do to the best of its ability. That Heatherington's arrival  
3 before this Court has been delayed is not attributable to the  
4 government and certainly does not warrant mitigation for defendant.

5 3. Sean Ewing

6 Defendant makes an assortment of claims regarding Ewing's  
7 possible knowledge of the scheme. (Def. Mem. at 10-11.) In his  
8 deferred prosecution agreement, Ewing admitted that he caused ACMH's  
9 failure to maintain books and records required under the Investment  
10 Advisers Act in relation to the fraud scheme. (See Docket No. 17  
11 ¶¶ 3-4, United States v. Sean Ewing, CR-16-317-JAK.) There was scant  
12 evidence at trial regarding Ewing's involvement in the scheme.  
13 Indeed, the evidence pointed to a scheme between the co-conspirators  
14 charged, even if Ewing should have had some awareness of problems  
15 based upon the Parsi letter. In any event, the disparity between the  
16 disposition of Ewing's case and the recommended sentence for  
17 defendant here is accounted for in the 15-level variance that the  
18 government seeks, and certainly does not warrant a probationary term.

19 4. Craig Heatherington

20 Defendant claims that a probationary sentence is warranted  
21 because Craig Heatherington received a deferred prosecution agreement  
22 with the government. As Craig Heatherington stated at trial, he was  
23 a commercial diver who had no experience in finance or securities  
24 trading when he was recruited by his brother to work in the back  
25 office at the Absolute Funds. Craig Heatherington's role in the  
26 conspiracy was limited to doctoring internal spreadsheets and  
27 covering up discrepancies when they arose after the illegal trades  
28 were executed. His personal profit from the scheme was minimal, as

1 was his awareness of the full scope of the scheme, unlike defendant.  
2 Moreover, he accepted responsibility for his conduct, provided  
3 documents to the government, and truthfully testified at trial. As  
4 such he is not similarly situated with defendant and any disparities  
5 in their sentences already are accounted for in the government's  
6 recommended sentence.

7           5. Pagliarini and Ahn

8           Defendant argues that there are unwarranted sentencing  
9 disparities because Pagliarini and Ahn were not charged. (Def. Mem.  
10 at 12-13.) Once again, defendant tries to hide behind the employees  
11 he placed in harm's way and who already both suffered greatly as a  
12 result of his actions. Put simply, Pagliarini and Ahn only knew what  
13 defendant told them—and he did not want them to know the details of  
14 his scheme, so he hid information from them both.

15           Ahn was a "glorified order taker" and, as defendant  
16 acknowledges, made little, if any, profit from the scheme (he  
17 received his standard salary and small bonuses as opposed to the tens  
18 of millions defendant received). (Ex. 5 at 96-97; Def. Mem. at 15.)  
19 Defendant is the one who ordered Ahn to use the secret IM system. He  
20 is the person who told Ahn to hide the secret IM system from  
21 Pagliarini and regulators. And those secret IMs show that  
22 defendant's approval was needed for all trades. The HWM employees  
23 all stated that defendant, not Ahn, controlled the trading desk and  
24 approved all trades. Ultimately, Ahn admitted his conduct, provided  
25 the secret IMs to the government, and was sanctioned significantly  
26 for his conduct and lost his trading license.

27           Elizabeth Pagliarini also is not similarly situated to the  
28 defendant. Pagliarini technically approved every trade at HWM, but

1 as was clear from trial, she was unaware of the secret IMs and never  
2 would have approved the trades had she known about them. (Trial Tr.,  
3 43-45, June 27, 2019, attached hereto as Ex. 11.) Defendant lied to  
4 Pagliarini about the secret IMs and told Tony Ahn to lie to her. As  
5 soon as she found out, she quit HWM and self-reported to the SEC.  
6 The Court was present for her testimony and so is aware of the  
7 profound personal difficulties she was experiencing during the  
8 relevant period, which no doubt contributed to her missing some red  
9 flags. Defendant also was aware of these facts and even said it was  
10 good not to have a compliance officer who was around all the time.  
11 Defendant should not be rewarded for taking advantage of Pagliarini's  
12 distracted state in the wake of her personal tragedies. Moreover,  
13 there was no evidence whatsoever that Pagliarini received any  
14 personal benefit from the scheme—financial or otherwise (aside from  
15 receiving her standard salary and minimal bonuses during the same  
16 period). In any case, she too received a significant sanction from  
17 the SEC as a result of her conduct.

#### 18 6. Sentences in Other Cases

19 The government's recommended sentence of 96 months' imprisonment  
20 takes into account sentences imposed in other criminal stock  
21 manipulation cases. For example, the U.S. Sentencing Commission  
22 Report on Securities and Investment Fraud Offenses reported that in  
23 2018 (fiscal year), the average sentence imposed for securities and  
24 investment fraud offenses was 54 months' incarceration, reflecting a  
25 downward variance from the average low-end Guidelines range of 77  
26 months. (See Report at 2, available at  
27 <https://www.ussc.gov/sites/default/files/pdf/research-and->  
28 [publications/quick-facts/Securities\\_Fraud\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY18.pdf).) Notably, the

1 median loss amount in these cases was \$2-3 million, significantly  
2 lower than the over \$200 million in losses at issue in this case.  
3 Indeed courts in cases with losses more similar to the instant case  
4 have sentenced defendants even more harshly than the reasonable 96-  
5 month sentence the government has recommended here,<sup>3</sup> which accounts  
6 for the various mitigating and aggravating factors present in this  
7 case. In sharp contrast, defendant's recommended sentence of  
8 probation is so disconnected from the guidelines and so dissimilar  
9 from similarly situated defendants that it would result unwarranted  
10 sentencing disparities.

#### 11 **D. General Deterrence**

12 Defendant's request for a probationary sentence also ignores the  
13 goal of general deterrence. This case represents one of many  
14 involving unscrupulous opportunists seeking to manipulate stock  
15 prices for their own advantage, which undermines the free-market. As  
16 demonstrated by this case, prosecuting such conduct requires  
17 considerable government resources. In order to obtain the evidence  
18 to prosecute this case, the investigation relied on assistance from  
19 FINRA, the SEC, and the FBI, as well as substantial international  
20

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21 <sup>3</sup> See, e.g., United States v. Georgiou, 777 F.3d 125, 132 (3d  
22 Cir. 2015) (defendant sentenced to 300 months' imprisonment for  
23 participation in a market manipulation scheme involving penny stocks  
24 that resulted in \$55 million in actual losses); United States v.  
25 Schwamborn, 467 F. App'x 35, 36 (2d Cir. 2012) (defendant sentenced  
26 to 121 months' imprisonment for participation in stock manipulation  
27 scheme); see also United States v. Schwamborn, 542 F. App'x 87, 89  
28 (2d Cir. 2013) ("[I]t was entirely foreseeable that the victims here  
would lose their investments because the stock in World Cyberlinks  
was inherently worthless"); S.E.C. v. Durante, 641 F. App'x 73, 76  
(2d Cir. 2016) (defendant pleaded guilty to conspiracy to commit  
securities fraud and money laundering in connection with a stock  
manipulation scheme; defendant sentenced to 121 months'  
imprisonment). The government's recommended sentence of 96 months'  
imprisonment accordingly does not present unwarranted sentencing  
disparities with similarly situated defendants.

1 assistance from law enforcement agencies in Switzerland, Canada, and  
 2 the Cook Islands, among other countries. Investigators and forensic  
 3 accountants then had to comb through millions of lines of trading  
 4 data, analyze numerous bank accounts, and sift through millions of  
 5 pages of other discovery. In light of the substantial challenges  
 6 inherent in investigating and prosecuting such illicit conduct, when  
 7 the government is able to successfully investigate these crimes,  
 8 significant sentences (like the 96-month sentence recommended here)  
 9 are necessary to ensure that others are dissuaded from attempting  
 10 similar crimes.

#### 11 **IV. LOSS CALCULATIONS**

12 Defendant's claim that loss and gain cannot be reliably  
 13 determined (Def. Mem. at 19-32) is undercut by the 555-page Appleby  
 14 Report, filed under seal, which was the result of the Absolute Funds  
 15 investigation into the Funds' losses resulting from the fraud.  
 16 Defendant does not address the report in a systematic or specific way  
 17 and instead makes vague claims that calculating losses in such cases  
 18 can be difficult. While this is true, the government has submitted a  
 19 detailed report that reasonably estimates the actual losses here.<sup>4</sup>

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21 <sup>4</sup> The Court is permitted to rely on the report and need not  
 22 require live testimony. In Williams v. New York, 337 U.S. 241  
 23 (1949), the Supreme Court held that courts may consider hearsay at  
 24 sentencing. See also United States v. Berry, 258 F.3d 971, 976 (9th  
 25 Cir. 2001) (citing Williams); United States v. Littlesun, 444 F.3d  
 26 1196, 1199 (9th Cir. 2006) (holding that hearsay at sentencing must  
 27 merely "be accompanied by some minimal indicia of reliability"). The  
 28 Sentencing Guidelines follow suit by allowing a sentencing court to  
 consider information relevant to the sentencing determination  
 "without regard to its admissibility under the rules of evidence  
 applicable at trial, provided that the information has sufficient  
 indicia of reliability to support its probable accuracy." U.S.S.G.  
 § 6A1.3(a). The Ninth Circuit has affirmed the admissibility of  
 hearsay at sentencing so long as such materials are accompanied by  
 "some minimal indicia of reliability." See United States v. Petty,

1       The Ninth Circuit has held that estimating losses does not  
2 require "absolute precision," and a district court may "make a  
3 reasonable estimate . . . based on the available information."  
4 United States v. Zolp, 479 F.3d 715, 719 (9th Cir. 2007). It is  
5 "sufficient for the government to produce evidence . . . to allow the  
6 sentencing court reasonably to infer a pattern." United States v.  
7 Pham, 545 F.3d 712, 720 n.3 (9th Cir. 2008). As to the calculation  
8 of losses relating to the value of securities, the guidelines  
9 specifically state that the reduction in the value of securities due  
10 to a defendant's conduct may be considered in the estimate of loss.  
11 U.S.S.G. § 2B1.1, comment. (n.3(C)(v)). Of course, "[d]etermining  
12 the extent to which a defendant's fraud, as distinguished from market  
13 or other forces, caused shareholders' losses inevitably cannot be an  
14 exact science. The guidelines' allowance of a 'reasonable estimate'  
15 of loss remains pertinent." United States v. Rutkoske, 506 F.3d 170,  
16 179 (2d Cir. 2007) (emphasis added) (citation omitted). Notably,  
17 "[i]n cases where," as here, "defendants promoted worthless stock in  
18 worthless companies, measuring the loss as the entire amount raised  
19 by the schemes is neither surprising nor complex, and is fully  
20 consistent with civil loss causation." United States v. Olis, 429  
21 F.3d 540, 546 (5th Cir. 2005) (recognizing the difference between  
22 calculating losses in cases like United States v. Hedges, 175 F.3d  
23 1312, 1314-15 n.6 (11th Cir. 1999), where the corporation's "stock  
24 became worthless when the conspiracy was discovered" and cases where  
25 the fraudulent transactions "cook the books" but do not render the  
26 underlying companies' stock "worthless"). The timing of the decline  
27 \_\_\_\_\_  
28 982 F.2d 1365, 1369 (9th Cir. 1993). Given the detailed description  
of the methodology used here, it satisfies more than the "minimal  
indicia of reliability," and the Court is permitted to rely on it.

1 in the penny stock share prices in this case is instructive, as the  
2 shares declined sharply after the fraudulent scheme was discovered.  
3 See Rutkoske, 506 F.3d at 179 (noting that in cases "where share  
4 price drops so quickly and so extensively immediately upon disclosure  
5 of a fraud[,] the difference between pre- and post-disclosure share  
6 prices is a reasonable estimate of loss caused by the fraud").

7 Thus, the analysis here is not as complex (nor surprising) as  
8 the cases defendant cites in his favor because defendant located the  
9 penny stock companies in order to use them as tools in the portfolio  
10 pumping scheme, and following the collapse of the scheme, the penny  
11 stock companies were rendered worthless or nearly so, such that their  
12 shares generally could not be redeemed. The government's loss  
13 calculations account for the purchase and sale of the penny stocks by  
14 the Absolute Funds and the Hunter Fund and account for the "final  
15 realized gain or loss on the [penny stocks] and Hunter Fund in the  
16 currency in which the losses were incurred." (See Appleby Report at  
17 5.)

18 In sum, the Appleby Report provides a detailed financial  
19 analysis that clearly describes the methodology used to calculate  
20 loss amounts (see Appleby Report at 5-6) and provides the necessary  
21 reasonable loss estimate that the guidelines require. Thus, whether  
22 the Court applies the preponderance or clear and convincing standard  
23 for determining loss, the Report meets the government's burden of  
24 providing reliable support for the loss and restitution amounts.  
25 (See Appleby Report at 10 (chart summarizing actual loss).)

## 26 **V. CONCLUSION**

27 For the foregoing reasons, the government respectfully requests  
28 that this Court sentence defendant to 96 months' imprisonment, a

1 five-year term of supervised release, restitution to the Absolute  
2 Funds in the amount of \$215,815,031, and a special assessment of  
3 \$1,800.